

## **REMARKS**

In the Office Action dated July 20, 2009, claims 2, 3 and 9 were rejected under 35 U.S.C. §102(b) as being anticipated by Westenskow et al.

Applicant notes with appreciation the telephone interview courteously afforded the undersigned representative of the Applicant on November 17, 2009, in which this rejection was discussed.

In the telephone interview, Applicant submitted that the space defined between the flaps of the valve 2 in the Westenskow et al. reference is not a “dead space” or “dead volume” as defined in the definition provided in the attachment to Applicant’s previous response, which was adapted by the Examiner in the latest Office Action. This is because the flaps of the valve 2 in Westenskow et al. effectively operate as a check valve (one-way valve), and all air that enters into that space is scrubbed of carbon dioxide in the scrubber 10 and is returned to that volume, together with replenished oxygen. The composition of the gas in the volume defined by the flaps of the valve 2, therefore, continuously changes with each respiration cycle, and thus does not fall within the aforementioned definition, that requires there be no change in composition of gas in a dead space.

In the telephone interview, the Examiner stated that in the Final Rejection, the Examiner was not relying solely on the volume between the flaps of the valve 2 in Westenskow et al. as being a dead space, but was instead relying on the volume between the valve 2 and the bellows 11. The Examiner stated that once a portion of the gas exiting from the valve 2 goes into the scrubber 10, a remainder of the gas goes into the bellows 11, and is then returned, and thus the composition of that

portion of the gas is unchanged. The Examiner stated the CO<sub>2</sub> scrubber 10 then represents a bypass with respect to that dead space.

It was agreed in the telephone interview, however, that if the volume in the Westenskow et al. apparatus designated by the Examiner is, in fact, a “dead space,” the air in that volume is not re-breathed by the patient, as in the subject matter disclosed and claimed in the present application. It was therefore agreed in the telephone interview that if the independent claims of the present application were amended to state that the gas in the dead space is re-breathed by the patient, this would preclude continued reliance on the Westenskow et al. reference by the Examiner.

Independent claims 9 and 10 have therefore been amended as discussed in the interview. Support in the original specification for the fact that the gas in the dead space is re-breathed by the patient in the method and apparatus according to the present invention is found in the substitute specification at page 5, lines 18-23.

The Examiner also suggested in the telephone interview that the terms “outlet” and “inlet” be more specifically defined. This has been done in the amended versions of claims 9 and 10 submitted herein. Moreover, since the term “bypass path” is now being used instead of “second flow path,” there is no need to designate the other flow path as the “first flow path,” and therefore that flow path is now designated as the “primary flow path.”

Although not discussed in the telephone interview, Applicant submits that the above arguments are applicable as well to the rejection of claims 5-7 and 10 under 35 U.S.C. §103(a) based on Westenskow et al. and Perhag. For the above reasons, even if the Westenskow et al. apparatus were modified to provide a reflector therein,

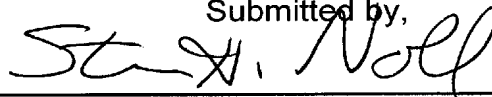
as disclosed in the Perhag reference, the subject matter of claim 10, and the claims depending therefrom, still would not result.

The Examiner also stated in the telephone interview that amending the claims in this manner would raise a new issue requiring further searching or consideration, and therefore it would be necessary to file an RCE in order to have such an Amendment entered and considered. The present Amendment is therefore accompanied by the filing of an RCE.

Early reconsideration of the application is respectfully requested.

The Commissioner is hereby authorized to charge any additional fees which may be required, or to credit any overpayment to account No. 501519.

Submitted by,



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